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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. _____

724 37

LLOYD A. FRY ROOFING COMPANY _____ *Petitioner*

vs.

SCOTT WOOD ET AL. AS ARKANSAS PUBLIC
SERVICE COMMISSION _____ *Respondents*

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS**

EUGENE R. WARREN

Counsel for Respondents

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STATEMENT

The petitioner, Lloyd A. Fry Roofing Company, which for brevity we will hereinafter refer to as Fry, seeks a writ of certiorari from this Court to the Supreme Court of Arkansas, asserting that the Supreme Court of Arkansas, in finding successive lease arrangements between Fry, one Whittington and certain driver-owners a mere subterfuge to evade the transportation laws of Arkansas, and in requiring the driver-owners using the highways of Arkansas to obtain permits as contract carriers, has imposed a burden upon interstate commerce and has infringed upon its constitutional rights.

In an attempt to gain the advantage of private carriage of commodities without the accompanying burdens or hazards, Fry adopted a very ingenious device of lease arrangement with certain owners of vehicles through a third person, Whittington, the final sum and effect of

which was to allow Fry to ship its goods over the highways of Arkansas in vehicles operated by the owners thereof, who had not obtained permits from the State of Arkansas as contract carriers. Payment, according to the ultimate effect of the leases, was based upon a mileage rate. Asserting that the driver-owners were, in fact, contract carriers under the definition of Section 5 of Act 367 of the Acts of Arkansas of 1941, commonly called the Arkansas Motor Carrier Act, the enforcement officials of the Arkansas Public Service Commission arrested and filed charges against certain of the driver-owners for violations of the Arkansas Motor Carrier Act. No charges were ever made against Fry, which interposed itself between the state and the driver-owners by injunctive action against the Public Service Commission to prohibit its enforcement officers from disturbing or arresting the driver-owners on the theory that they were Fry's employees and immune from the provisions of the Arkansas Motor Carrier Act.

The decision of the Supreme Court of Arkansas was rendered after a full consideration of evidence contained in a large record, and is based upon a finding from that consideration of the evidence that the lease agreements were but devices to evade the provisions of the Arkansas Motor Carrier Act. This is apparent from the language of the opinion (Rec. 225). The effect of the decision of the Arkansas Supreme Court is to require that persons, who it found from factual considerations were in fact contract carriers as defined by the statutes of Arkansas, obtain permits for contract carriage in accordance with the statute. That such determination of fact possibly might prevent petitioner from enjoying a peculiar financial advantage, or advantageous immunity in the use of the highways of the State of Arkansas, hardly could be said to raise a substantial federal question.

ARGUMENT

Contract Carriers Engaged in Interstate Commerce Validly May be Required to Obtain a Permit from the State of Arkansas

The respondents submit that the petition for writ of certiorari should be denied for the primary reason that this Court has many times held that the requirement by a state that interstate carriers obtain a permit to use the highways of the state is not an undue burden upon interstate commerce. It is significant that neither petitioner nor the driver-owners have applied for or received a permit or certificate from the Interstate Commerce Commission. Attention is respectfully directed to the letter of the representative of the Interstate Commerce Commission to Fry (Rec. 162) and Fry's response thereto (Rec. 163). No application has been made for permit from the State Public Service Commission. Petition should, therefore, be denied. *Columbia Terminals Company v. Lambert, et al.*, 84 L.Ed. 983, 309 U.S. 620; *Frank Eicholz v. Public Service Commission of the State of Missouri*, 306 U. S. 268, 83 L.Ed. 641; *South Carolina State Highway Department v. Barnwell Brothers, Inc., et al.*, 303 U. S. 177, 82 L.Ed. 734; *Latta Truck Lines v. Hargus*, 29 F. Supp. 53.

No Federal Question Is Involved

Since this Court has held consistently that a state, in the absence of discrimination, may require persons using its highways for profit and gain to obtain a permit for such use even though interstate commerce is incidentally affected, the only question remaining is whether or not the driver-owners were contract carriers under the definition set out in the Arkansas Motor Carrier Act. This

involves an interpretation of facts under a state law. Such an interpretation made by the highest Court of the state will not be disturbed by this Court. *Williams v. Kaiser*, 323 U. S. 471, 89 L.Ed. 398; *United Gas Public Service Company v. Texas*, 303 U. S. 123, 82 L.Ed. 702.

CONCLUSION

The Petition should be denied.

EUGENE R. WARREN

Counsel for Respondents